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Supreme Court, U.S.
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IN THE

OFFICE OF THE

# Supreme Court of the United States

LEONARD S. LEVINE,

*Petitioner,*

*v.*

HAUPPAUGE PUBLIC SCHOOLS; ROBERT C. DALLOW, in his Capacity as Acting Superintendent, Hauppauge Public Schools and as Principal of Hauppauge High School; ROBERT C. PARRY, in his Capacity as Superintendent of Hauppauge Public Schools; BOARD OF EDUCATION, Hauppauge Public Schools; ROBERT BIELLO, in his Capacity as member of the Board of Education, Hauppauge Public Schools; FRANK PROCACCINI, in his Capacity as Member of the Board of Education, Hauppauge Public Schools; ANITA GAGLIARDI, in her Capacity as Member of the Board of Education, Hauppauge Public Schools; DONALD LESLIE, in his Capacity as Member of the Board of Education, Hauppauge Public Schools; JAMIE FAIRLEY, in his Capacity as Member of the Board of Education, Hauppauge Public Schools; JOYCE O'LEARY, in her Capacity as Member of the Board of Education, Hauppauge Public Schools and PAUL A. LOCHNER, in his Capacity as Superintendent, Hauppauge Public Schools,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Whether the Court of Appeals for the Second Circuit misapplied the summary judgment rule as enunciated and applied by this Court, and lower federal courts in determining that plaintiff had not met his burden of proof that his adverse employment determinations and differential treatment were causally connected to his First Amendment protected speech.

2. Whether the Court of Appeals for the Second Circuit improperly denied plaintiff the right to a jury trial on disputed issues of material fact and on issues of discriminatory motive and intent.

## TABLE OF CONTENTS


| | Page |
|---|---|
| Questions Presented | i |
| Table of Contents | ii |
| Table of Cited Authorities | iv |
| Table of Appendices | vi |
| Opinion Below | 1 |
| Statement of Jurisdiction | 1 |
| Statutory Provisions And Rules Involved | 1 |
| Statement of the Case | 3 |
| Reasons for Granting the Writ | 9 |
| Argument | 10 |
| I. The Second Circuit Overstepped The Bounds Of The Parameters Established By This Court's Trilogy Of Summary Judgment Decisions In Assessing When Summary Judgment Is Appropriate In A Retaliation And Differential Treatment Claim | 10 |
| A. The Second Circuit Erred in Concluding that Mr. Levine did not Meet the "*De Minimis*" Burden of Proof of His *Prima Facie* Case of First Amendment Retaliation | 13 |

*Contents*

*Page*

B. There Was Substantial Evidence to Establish that a Reasonable Jury Could Conclude that Mr. Levine Could Meet His Substantive Burden of Proof For a First Amendment Retaliation Claim and Differential Treatment Claim ..... 15

C. The Defendants' Proffer of Nondiscriminatory Reasons for Their Actions Raised Questions of Fact to Defeat Summary Judgment ..... 17

II. Summary Judgment Is Properly Regarded As A Procedural Remedy For Disposing Of Claims Which Should Be Sparingly Employed In Order To Avoid Depriving Litigants Of Their Right To A Jury Trial When Material Facts Are In Dispute. ..... 18

III. It Is Settled Law, As Expounded By This Court And Other Federal Courts, That Summary Judgment May Not Be Employed To Extinguish A Plaintiff's Claim Without Trial, Where Issues Of State Of Mind And Credibility Are Present ..... 19

IV. The Second Circuit Erred In Finding That Mr. Levine Adduced No Evidence That His Reassignment To Whiporwil Was Retaliatory ..... 21

Conclusion ..... 23

## TABLE OF CITED AUTHORITIES

*Page*

**Cases:**

*Agosto v. INS*, 436 U.S. 748 (1978) ..... 19

*Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S. Ct. 2505 (1986) ..... 10, 11, 15

*Applegate v. Top Assoc.*, 425 F.2d 92 (2d Cir. 1980) ..... 18

*Carlton v. Mystic Transp., Inc.*, 202 F.3d 129 (2d Cir. 2000) ..... 17, 21

*Celotex Corp. v. Cattrett*, 477 U.S. 317, 106 S. Ct. 2548 (1986) ..... 11

*Cronin v. Aetna Life Ins.*, Co, 46 F.3d 196 (2d Cir. 1995) ..... 13, 17

*D'Amico v. City of New York*, 132 F.3d 145 (2d Cir. 1999) ..... 18

*Dister v. Continental Group, Inc.*, 859 F.2d 1108 (2d Cir. 1988) ..... 11, 13

*Finnegan v. Board of Education*, 30 F.3d 273 (2d Cir. 1994) ..... 22

*Hale v. Mann*, 2000 U.S. App. Lexis 11664 (May 25, 2000) ..... 20

*Morris v. Lindau*, 196 F.3d 102 (2d Cir. 1999) ... 15, 16

*Cited Authorities*

*Page*

**Statutes:**

28 U.S.C. § 1254(1) ..... 1

28 U.S.C. § 2106 ..... 1

42 U.S.C. § 1983 ..... 1, 5, 7

**United States Constitution:**

First Amendment ..... i, 5, 6, 7, 10, 13, 14, 15, 16, 20

**Rules:**

Fed. R. Civ. P. 56 ..... 18

Fed. R. Civ. P. 56(c) ..... 2

Fed. R. Civ. P. 56(e) ..... 15

New York Civil Practice Law and Rules Section 7803(3) ..... 2

New York Civil Procedures Law and Rules Article 78 ..... 5, 7

**Other Authority:**

Moore's Federal Practice 56.02 (3rd ed. 1977) .... 18

## TABLE OF APPENDICES

*Page*

Appendix A — Summary Order Of The United States Court Of Appeals For The Second Circuit Dated And Filed March 28, 2000 ..... 1a

Appendix B — Memorandum Decision And Order Of The United States District Court For The Eastern District Of New York Dated August 10, 1999 ..... 7a

Appendix C — Order Of The United States Court Of Appeals For The Second Circuit Denying Petition For Rehearing Dated And Filed May 17, 2000 ..... 26a

Petitioner, Leonard Levine, respectfully requests that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

## OPINION BELOW

The opinion of the United States Court of Appeals for the Second Circuit is not published. A copy of the opinion is included in the Appendix, as Appendix A. The judgment and order of the district court in *Levine v. Hauppauge Public Schools, et al.*, is not published. It is included in the Appendix as Appendix B.

## STATEMENT OF JURISDICTION

The United States Court of Appeals for the Second Circuit entered its summary order in this case on March 28, 2000. Petitioner sought rehearing and rehearing en banc. The petition for rehearing was denied on May 17, 2000. A copy of the order is included in the Appendix as Appendix C. The Petition for Writ of Certiorari is filed within 90 days of the denial of the Petition for Rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. §§ 1254(1) and 2106.

## STATUTORY PROVISIONS AND RULES INVOLVED

Civil Rights Act — 42 U.S.C. Section 1983:

> Every person who under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of

> the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . .

Rule 56(c) of the Federal Rules of Civil Procedure, Fed. R. Civ. P. 56(c), provides in pertinent part:

> (c) Motion and Proceedings Thereon.
>
> The motion [for summary judgment] shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. . . .

Section 7803(3) of the New York Civil Practice Law and Rules

> The only questions that may be raised in a proceeding under this article are: . . .
>
> (3) whether a determination made in violation of a lawful procedure was affected by an error of law or was arbitrary and capricious or an abuse of discretion, including abuse of discretion as to the measure or mode of penalty or discipline imposed . . .

## STATEMENT OF THE CASE

The facts of this case are uncomplicated. Petitioner, Mr. Levine was, at all relevant times, an assistant principal in the Hauppauge High School within the respondent, Hauppauge Public Schools. Mr. Levine had been a tenured administrator in the Hauppauge Public Schools since 1977. Over a 17 year period, Mr. Levine was never the subject of disciplinary action until the 1993-1994 school year, immediately following the year in which Mr. Levine openly criticized the school district and defendants concerning issues of school district policies and procedures.

Specifically, Mr. Levine was engaged in a number of situations where he was vocal and openly critical of the school district, then High School Principal Dallow and several members of the Board of Education, all of whom are named defendants. Mr. Levine complained to Dallow about the inadequacies of the new student attendance policy: He also complained about the school district's failure to enforce the student smoking and drug policy when it came to children of staff or board members in the school district: Mr. Levine further complained about defendant board member Biello having a conflict of interest because he did business with the school district and he complained about another defendant school board president, Joyce O'Leary, condoning teenage drinking by permitting a beer keg party for high school students to take place at her home.

Defendant Dallow launched a series of actions which were continued by defendant Parry and resulted in Mr. Levine being investigated by the school attorney and brought up on disciplinary charges for alleged misconduct for which other staff also accused of similar or worse conduct were never

investigated nor charged, and ultimately placed on a three year suspension without pay. Upon his return from the three year suspension without pay, defendant Lochner, after consulting with his administrative cabinet, all of whom had been involved in the disciplinary proceedings, reassigned Mr. Levine to the Whiporwil Building, a building which the school district used solely for maintenance and storage.

Specifically, the disciplinary charges in question were preferred because Mr. Levine lightly tapped a student on the back of his head to get his attention after the student had ignored his directive to pick up the piece of paper which he had thrown on the cafeteria floor. In these same set of charges, Mr. Levine was also charged with an inability to properly communicate with staff and students, with using inappropriate language in discussions with defendant Dallow and with making inappropriate remarks at an awards ceremony. With respect to the first specification of this charge, the school district withdrew the allegation because of lack of proof. The other specifications of the charge related to Mr. Levine's speech were found to be unsubstantiated by the disciplinary hearing panel and dismissed.

The hearing panel found Mr. Levine guilty of the charge pertaining to a violation of the school district's corporal punishment policy and of insubordination. The panel recommended to the Board of Education that Mr. Levine be suspended for three years without pay.

The Board of Education had the discretion to either adopt, reject or modify the hearing panel's recommendation. By unanimous vote, the Board placed Mr. Levine on a three year suspension without pay, effective September 1, 1994. The school district admitted, in response to discovery

demands and during depositions, that Mr. Levine was the only staff member ever to be suspended for three years without pay.

Mr. Levine appealed the severity of his penalty to the New York State Supreme Court, County of Suffolk, pursuant to Article 78 of the New York State Civil Practice Law and Rules. The state court ruled that the penalty of a three year suspension without pay was not excessive.

Mr. Levine then filed this action pursuant to Section 1983, of the Civil Rights Act in the United States District Court, Eastern District of New York, alleging that the school district had retaliated against him for exercising his First Amendment right of speech. Mr. Levine showed selective enforcement of school policies and differential treatment of him, resulting in his three year suspension without pay and his reassignment to a storage building upon his return from suspension.

The gist of Mr. Levine's First Amendment claim was that the school district treated him differently than other similarly or worse situated staff in terms of the decision to investigate him, prefer disciplinary charges against him, impose a penalty of three years suspension without pay and reassign him to a maintenance and storage building.

From the school district's own records and the deposition testimony of the school's attorney, Mr. Levine showed that there were other teachers and/or administrators who committed far more egregious acts than that of which he was accused, but they were never investigated, nor brought up on disciplinary charges: Nor were they placed on a three year suspension without pay. Mr. Levine alleged that the

school district singled him out for this differential treatment because he engaged in protected speech and was an outspoken critic of school district policies and practices.

Mr. Levine pointed to numerous instances where he raised issues of a public concern with either his superiors or the Board of Education on matters pertaining to the lack of enforcement of student drinking and drug policies, Board of Education members doing business with the school district and lack of an effective student absenteeism policy.

Mr. Levine further complained that the school district's retaliatory actions continued once he returned from his three year suspension, in that he was out stationed to the Whiporwil Building, which had been abandoned by the school district for many years. Mr. Levine was made to work under onerous conditions: no office, no telephone; no fax; no secretary or support staff. He was also directed not to set foot in the high school during the instructional day. His hours of work were changed and different from all other employees with his job title and he was assigned duties which were either nonexistent or which were already being performed by other assistant principals in the high school.

The school district filed a motion for summary judgment relying primarily on the doctrine of collateral estoppel, to wit that Mr. Levine was estopped from raising his First Amendment claim by virtue of the fact that the New York State Supreme Court had denied his petition and determined that the school district's penalty was not excessive.

The District Judge granted the school district's motion for summary judgment on the grounds of collateral estoppel and also on the grounds that there was no proof that

Mr. Levine's reassignment to Whiporwil was retaliatory since defendant Lochner was not the Superintendent of Schools at the time of his disciplinary action. Consequently, the District Court did not reach the substantive issue of whether there were material facts in dispute concerning Mr. Levine's claim of retaliation. The District Judge did not assess whether Mr. Levine established a *prima facie* case for a First Amendment retaliation claim because it found that his claim of differential treatment raised the identical issues as those raised in the New York State Court proceeding pursuant to Article 78 of the New York Civil Procedures Law and Rules and was thereby precluded under the doctrine of collateral estoppel.

On appeal from this ruling to the United States Court of Appeals for the Second Circuit, Mr. Levine argued that his Section 1983 claim was not identical to the state court proceeding in that the former raised issues of retaliation and differential treatment on account of his speech, whereas the latter dealt solely with the issue of the severity of the penalty imposed by the Board of Education following the hearing panel's recommendation.

The Second Circuit embraced the rationale articulated by Mr. Levine on appeal, ruling that collateral estoppel did not operate to bar the differential treatment and First Amendment claims. However, the Court of Appeals, in its March 28, 2000 decision affirmed the District Judge's granting of summary judgment on different grounds. The Second Circuit determined that Mr. Levine had failed to make out a *prima facie* case of First Amendment retaliation, specifically by failing to establish a causal connection between his speech and the disciplinary action and his subsequent reassignment to the Whiporwil Building.

The undisputed facts which were before the Second Circuit were as follows:

* During the period from 1989-1997, there were 14 reported incidents of corporal punishment;

* None of the 14 incidents were investigated by the school attorney with a view towards preferring disciplinary charges, except the case of Mr. Levine;

* None of the 14 situations resulted in the imposition of a three year suspension without pay, except Mr. Levine.

* At least two staff persons had committed repeated acts of serious corporal punishment, but neither was punished or disciplined to the extent Mr. Levine was;

* The school district reported to the New York State Department of Education in July, 1994 that disciplinary charges were in progress against Mr. Levine, while in fact charges were not preferred until November 1994;

* None of the other staff were reassigned to the Whiporwil Building, except Mr. Levine.

Mr. Levine petitioned for rehearing and was denied on May 17, 2000. Mr. Levine has duly filed a petition for writ of certiorari within ninety days of the entry of this ruling.

## REASONS FOR GRANTING THE WRIT

The Second Circuit's ruling has serious implications in terms of the appropriateness of summary judgment in cases of discrimination or retaliation and in terms of determining whether a plaintiff meets his "*de minimis*" burden of proof in his *prima facie* case. Since summary judgment is such a drastic and serious measure, which if granted, forecloses the opportunity for the plaintiff to has his day in court, it must be used sparingly and carefully where there are issues of material fact in dispute.

This Court and lower federal courts continue to use caution in applying the summary judgment rule, in cases where the movant's state of mind and intent are in question and there is a realistic possibility that reasonable jurors could disbelieve defendants' denials of retaliation and differential treatment.

The Court of Appeals not only deviated from this mandate, but seriously undermined the function of the fact finder, thereby, eroding the fundamental protection of a right to a jury trial where there are issues of material fact in dispute.

## ARGUMENT

### I. THE SECOND CIRCUIT OVERSTEPPED THE BOUNDS OF THE PARAMETERS ESTABLISHED BY THIS COURT'S TRILOGY OF SUMMARY JUDGMENT DECISIONS IN ASSESSING WHEN SUMMARY JUDGMENT IS APPROPRIATE IN A RETALIATION AND DIFFERENTIAL TREATMENT CLAIM

In *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S. Ct. 2505 (1986) this Court emphasized that federal courts have a narrow scope of review in weighing and considering factors in summary judgment. Summary judgment will not lie if the dispute about a fact is "genuine", i.e., if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. In other words,

> [The] inquiry performed is a threshold inquiry of determining whether there is the need for a trial-whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party.

*Liberty Lobby, supra*, 477 U.S. at 250.

Here defendants allege that Mr. Levine was disciplined because he violated the school district's corporal punishment policy. Mr. Levine, on the other hand, alleges that he was disciplined in retaliation for exercising his First Amendment right of free speech. In support of his contention, Mr. Levine proved from the school district's own records and from the defendants' deposition testimony that he was brought up on

disciplinary charges the following school year after his open criticism of the school district, that he was the only staff person singled out for investigation by the school's attorney, although other staff had been accused of violating the school district's corporal punishment policy, that he was the only staff person formally charged and ultimately suspended for three years for purportedly violating the corporal punishment policy and reassigned to a building used solely for storage and maintenance. Thus, under this Court's rationale in *Liberty Lobby*, a trial is required to resolve these competing factual contentions.

On summary judgment the judge's function is not himself to weigh the evidence to determine the truth of the material issues, but to determine whether there is a genuine issue for trial. Facts are genuinely in dispute where there is a factual conflict between the movant and the non movant on a material issue, which requires a trial of the case in order to resolve the conflict.

The judge must ask not whether he thinks the evidence unmistakably favors one side or the other, but whether a fair minded jury could return a verdict for the plaintiff on the evidence presented. This Court reaffirmed this approach in *Celotex Corp. v. Cattrett*, 477 U.S. 317, 106 S. Ct. 2548 (1986), decided on the same day.

The Second Circuit, relying upon its holding in *Dister v. Continental Group, Inc.*, 859 F.2d 1108, 1114 (2d Cir. 1988) concluded that Mr. Levine offered no concrete evidence to support his allegation that the charges against him were substantially motivated by the defendants' retaliatory animus. Thus, the Second Circuit's inquiry ended when it determined that Mr. Levine had not met an element of his *prima facie* case.

The Second Circuit's conclusion is unsupported by the record, especially where all inferences must be drawn in favor of Mr. Levine, as the non moving party. Evidence of the non movant is to be believed and all justifiable inferences are to be drawn in his favor.

The Second Circuit ignored the substantial evidence from which a reasonable jury could find that the defendants acted out of retaliation for Mr. Levine having been an outspoken critic of the district and that he was treated differently. The undisputed facts which Mr. Levine placed before the Second Circuit went to the very heart of his *prima facie* case of retaliation and differential treatment. Mr. Levine established through school district records and defendants' responses to discovery demands that:

1. During the period from 1989-1997, there were 14 reported incidents of corporal punishment;

2. None of the 14 incidents were investigated by the school attorney with a view towards preferring disciplinary charges, except Mr. Levine's case; None of the 14 situations resulted in the imposition of a three year suspension without pay, except Mr. Levine's;

3. At least two staff persons had committed repeated acts of a serious corporal punishment against students, but neither was punished or disciplined to the extent Mr. Levine was; and

4. None of the other staff were reassigned to the Whiporwil Building, except Mr. Levine.

Instead of adhering to its clearly defined role, the Second Circuit made credibility determinations, weighed the evidence and drew inferences from these facts, all of which are jury functions, not those of a judge. The court's only role is to determine whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law; whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party.

The Second Circuit overstepped its bounds, by assuming the role of fact finder in this case.

**A. The Second Circuit Erred in Concluding that Mr. Levine did not Meet the "*De Minimis*" Burden of Proof of His *Prima Facie* Case of First Amendment Retaliation**

While the plaintiff has the ultimate burden of proving the elements of the claim by a preponderance of the evidence . . . , the showing that the plaintiff must make as to the elements of the *prima facie* case in order to defeat the motion for summary judgment is "*de minimis*". *Cronin v. Aetna Life Ins.*, Co, 46 F.3d 196, 203-204 (2d Cir. 1995); *Dister v. Continental Group, Inc.*, 859 F.2d 1110, 1114 (2d Cir. 1988).

In determining whether the plaintiff has met the "*de minimis*" initial burden of showing circumstances giving rise to an inference of discrimination, the function of the court on a summary judgment motion is to determine whether the proffered admissible evidence shows circumstances that would be sufficient to permit a rational finder of fact to infer a discriminatory motive. *Cronin, supra*, at p. 204.

In this context, the only question for current consideration is whether Mr. Levine met his "*de minimis*" burden of showing circumstances that would permit a rational finder of fact to infer a causal connection between Mr. Levine's speech and his differential treatment.

The Second Circuit shut its eyes to the direct and circumstantial evidence in Mr. Levine's case. The fact that following his protected speech he was singled out and subjected to harsher treatment than other staff who were accused of violating the school district's corporal punishment policy was given no consideration whatsoever by the Second Circuit.

The inference of retaliation is further strengthened by undisputed facts that Mr. Levine was the only staff person in the school district out of 14 others, all of whom were accused of violating the school district's corporal punishment policy, to be investigated by the school attorney, to be formally charged, to be suspended without pay for three years and to be reassigned following his suspension, to a building which the school district used primarily for storage and maintenance personnel.

The Second Circuit erroneously concluded that these undisputed material facts amounted to nothing more than conclusory allegations and that Mr. Levine had failed to raise a genuine issue of material fact that the school district's actions were casually connected to his exercise of his First Amendment rights.

**B. There Was Substantial Evidence to Establish that a Reasonable Jury Could Conclude that Mr. Levine Could Meet His Substantive Burden of Proof For a First Amendment Retaliation Claim and Differential Treatment Claim**

An assessment of the appropriateness of summary judgment must be made under the substantive law of the claim asserted by the plaintiff. This Court in *Liberty Lobby, supra*, required that the non movant's Rule 56(e) evidence opposing summary judgment must be more than merely possible or colorable: The evidence must be sufficient or substantial enough on the material issues of the substantive law to require a trial.

The substantive law of the specific issues in this case, First Amendment retaliation and differential treatment, place upon the plaintiff the initial burden of proving the following: That he engaged in constitutionally protected speech; that he suffered an adverse employment decision; and that a causal connection exists between his speech and the adverse employment determination against him, so that it can be said that his speech was the motivating factor in the determination. *Morris v. Lindau*, 196 F.3d 102, 110 (2d Cir. 1999).

The Second Circuit erroneously concluded that Mr. Levine failed to meet the third prong of this test, that his asserted differential treatment was causally connected to his exercise of his First Amendment right of speech, relying upon its decisions in *Morris v. Lindau, supra*.

In *Lindau, supra*, 110, the Second Circuit discussed the issue of causation as follows:

> The causal connection must be sufficient to warrant an inference that the protected speech was a substantial motivating factor in the adverse employment action . . .
>
> Causation can be established either indirectly by means of circumstantial evidence, for example by the showing that the protected activity was followed by adverse treatment in employment or directly by evidence of retaliatory animus.

Had the Second Circuit truly assessed Mr. Levine's evidence, which was presented in the form of response to interrogatories, deposition testimony, school district records and affidavits, it would have reached the only logical conclusion that there was evidence from which a reasonable jury could have drawn an inference that Mr. Levine's speech was a motivating factor in school district's differential treatment of him.

Moreover, with respect to the issue of causation, the Second Circuit in *Morris v. Lindau, supra*, 110, opined that summary judgment is precluded where questions regarding an employer's motive predominate in the inquiry regarding how important a role the protected speech played in the adverse employment decision.

In the instant case, the Second Circuit ignored its own rationale in First Amendment retaliation cases, to conclude that Mr. Levine had not met his burden of proof.

## C. The Defendants' Proffer of Nondiscriminatory Reasons for Their Actions Raised Questions of Fact to Defeat Summary Judgment

By failing to find that Mr. Levine had established a *prima facie* case, the Second Circuit never engaged in the remainder of the appropriate analysis of a summary judgment motion. The Second Circuit never reached the issue of whether the defendants articulated a legitimate reason for their actions: Nor did the Court of Appeals address whether Mr. Levine raised a genuine issue of fact as to whether the defendants' articulated reason was unworthy of credence.

As more fully set forth herein, had the Second Circuit properly concluded that Mr. Levine had met the "*de minimis*" burden of proving a *prima facie* case, the record supported a finding that there was substantial evidence to warrant the case being decided by a trier of fact on the issue of pretext and motive and burden of persuasion.

Ordinarily, plaintiff's evidence establishing a *prima facie* case and defendants' production of a nondiscriminatory reason for the employment action raise a question of fact to be resolved by the fact finder after a trial. *Carlton v. Mystic Transp., Inc.*, 202 F.3d 129, 135 (2d Cir. 2000) Summary judgment is appropriate at this point only if the employers' nondiscriminatory reason is dispositive and forecloses any issue of material fact. *See Cronin, supra*, at 203.

In the instant case, the fact finder could reasonably disbelieve that defendants took their actions solely because plaintiff had allegedly violated the school district's corporal punishment policy: Other employees who committed worse

acts than what Mr. Levine was accused, were never investigated by the school attorney, nor brought up on formal charges or suspended for three years without pay.

## II. SUMMARY JUDGMENT IS PROPERLY REGARDED AS A PROCEDURAL REMEDY FOR DISPOSING OF CLAIMS WHICH SHOULD BE SPARINGLY EMPLOYED IN ORDER TO AVOID DEPRIVING LITIGANTS OF THEIR RIGHT TO A JURY TRIAL WHEN MATERIAL FACTS ARE IN DISPUTE.

The summary judgment process outlined in Rule 56 of the Federal Rules of Civil Procedure has been described as being "a determination by the court concerning a case or an aspect of a case made prior to the trial that obviates the need for trial on that matter." Moore's Federal Practice, para. 56.02 (3rd ed. 1997). It provides that the trial court judge shall grant summary judgment if he finds there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. This remedy that precludes a trial is properly granted only when no rational finder of fact could find in favor of the non-moving party. *D'Amico v. City of New York*, 132 F.3d 145, 149 (2d Cir. 1999).

Indeed summary judgment has been referred to as a tool . . . as dangerous as it is valuable. *Applegate v. Top Assoc.*, 425 F.2d 92, 96 (2d Cir. 1980).

## III. IT IS SETTLED LAW, AS EXPOUNDED BY THIS COURT AND OTHER FEDERAL COURTS, THAT SUMMARY JUDGMENT MAY NOT BE EMPLOYED TO EXTINGUISH A PLAINTIFF'S CLAIM WITHOUT TRIAL, WHERE ISSUES OF STATE OF MIND AND CREDIBILITY ARE PRESENT

The right to confront and cross-examine witnesses at trial is even more compelling where the moving party's own state of mind or that of its agent, are critical issues, as in the instant case. Causes of action which call into question a party's state of mind must necessarily require an assessment of the witnesses' credibility. This in turn, normally requires that the case be allowed to proceed to trial where the jury, by observing direct and cross-examination will be able to assess properly that party's credibility. *Agosto v. INS*, 436 U.S. 748, 756 (1978).

State of mind cases present questions of fact which are not susceptible to resolution at the summary judgment stage where the record will consist entirely of pleadings, affidavits and other written documents. The nature of the inquiry into subjective mental state frequently involves the weighing of credibility by the court and consideration of varying inferences that may be drawn from the available evidence, an endeavor that, by its own nature does not lend itself to summary disposition.

Thus, the Court of Appeals, in a wide variety of legal and factual settings, have consistently disapproved the disposition by summary judgment where state of mind is an issue. The Second Circuit has time and again recognized that disposition by summary judgment is inappropriate where

there are issues of subjective intent and credibility in question. *See Hale v. Mann*, 2000 U.S. App. Lexis 11664 (May 25, 2000).

In *Hale v. Mann, supra*, the Court vacated and remanded the case where the district court had granted summary judgment on a First Amendment retaliation claim. The Second Circuit determined that the evidence established a genuine issue of material fact to be determined by the fact finder whether the appellant was terminated because of his speech or because of unacceptable job performance. The evidence which appellant presented raised a question as to what the employer's actual motives and intent were and the Second Circuit followed the well established rule that such issues are best left to the fact finder.

Far from unadorned speculation, an abundance of circumstances are present in the instant case, from which inferences can be drawn of the school district and its agents' actual intent and from which their credibility can be impeached regarding their profession of good faith. The record before the Second Circuit presents substantial evidence that defendants had a motive for bringing their adverse employment actions against Mr. Levine and for treating him differently than other similarly situated or worse situated staff, in terms of allegations of use of corporal punishment: Mr. Levine was openly critical of the school district and questioned school board members' conduct. These undisputed facts presented the basis for a realistic possibility that the jurors could disbelieve the defendants' defenses and their denial of any retaliatory or differential treatment.

In *Carlton v. Mystic Transp., Inc.*, 202 F.3d 129, 134 (2d Cir. 2000), the court emphasized:

> Because this is a discrimination case where intent and and state of mind are in dispute, summary judgment is ordinarily inappropriate . . . Thus, a trial court should exercise caution when granting summary judgment to an employer where, as here, its intent is a genuine factual issue.

The Second Circuit restructured the summary judgment rule, going from a search for the minimum facts which would support a plaintiff's case to an evaluation of the weight of those facts. Summary judgment is not properly a search for minimum facts supporting the plaintiff's case, but rather is a search for those contested facts which, if found to be as alleged by a non moving party, would permit a jury to find for that party.

## IV. THE SECOND CIRCUIT ERRED IN FINDING THAT MR. LEVINE ADDUCED NO EVIDENCE THAT HIS REASSIGNMENT TO WHIPORWIL WAS RETALIATORY

The Second Circuit incorrectly concluded that as a matter of law there could be no retaliation in the reassignment of Mr. Levine to the Whiporwil Building upon his return from the three year suspension without pay. Undue emphasis is placed on the fact that respondent Superintendent of Schools, Lochner, was not involved in the disciplinary charges and the suspension. However, it is totally plausible that a new superintendent of school would fall into lockstep with his predecessor in terms of carrying out the objective of making Mr. Levine's life miserable upon his return from his three year suspension without pay.

A reasonable jury could reach the conclusion of retaliatory motive concerning Mr. Levine's reassignment to the Whiporwil Building based on Lochner's own deposition testimony: Lochner testified that he conferred with his cabinet, Assistant Superintendents Curra, Bilyk and Perpignano, all of whom where involved in Mr. Levine's prior disciplinary actions.

Unlike the plaintiff in *Finnegan v. Board of Education*, 30 F.3d 273 (2d Cir. 1994), Mr. Levine has adduced evidence from which it could be inferred by a reasonable jury that Lochner's reassignment of him to the Whiporwil Building was related to his speech and a perpetuation of the retaliatory action respondents had taken in connection with their decision to single him out for investigation by the school attorney, preferring of formal disciplinary charges and placed on a three year suspension without pay.

Questions of inconsistency abound as to Lochner's motive in making the reassignment. First Lochner stated that Mr. Levine's reassignment to Whiporwil Building was done to keep Mr. Levine from having contact with students: However, then Lochner admitted that there was nothing in Mr. Levine's record which would cause him to have this concern: Nor had the school district made such a decision as a condition of Mr. Levine's employment following his suspension. Next, Lochner gave another and different reason for the decision to reassign Mr. Levine, to wit, to enable him to have time to readjust: Yet, once Mr. Levine filed a grievance, the school district moved him back to the High School within three weeks. Questions of inconsistencies in Lochner's testimony abound.

Thus, there is circumstantial evidence from which a jury could infer that the reassignment was a perpetuation of the punishment exacted upon Mr. Levine in retaliation for his criticism of the school district.

## CONCLUSION

The Court of Appeals' decision in this case is inconsistent with the standards for summary judgment as announced by this Court in its trilogy of decisions on this issue. The panel has engaged in judicial activism by taking on the role and function of the fact finder, thereby denying Mr. Levine the opportunity to have his day in court on material issues which the record establishes are in dispute and on issues where motive or intent are questions which a reasonable jury could validly raise. Accordingly, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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LAW OFFICE OF
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# APPENDIX

**APPENDIX A — SUMMARY ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED AND FILED MARCH 28, 2000**

**UNITED STATES COURT OF APPEALS**
**FOR THE SECOND CIRCUIT**

**SUMMARY ORDER**

* * *

**At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 28th day of March, two thousand.**

**PRESENT: HON. WILFRED FEINBERG,**
**HON. DENNIS JACOBS,**
**HON. CHESTER J. STRAUB,**
***Circuit Judges.***

**99-7981**

**LEONARD S. LEVINE,**

***Plaintiff-Appellant,***

**– v. –**

**HAUPPAUGE PUBLIC SCHOOLS; ROBERT C. DALLOW, in his Capacity as Acting Superintendent, Hauppauge Public Schools and as Principal of Hauppauge High School; ROBERT C. PARRY, in his Capacity as Superintendent of Hauppauge Public**

**Schools; BOARD OF EDUCATION, Hauppauge Public Schools; ROBERT BIELLO, in his Capacity as member of the Board of Education, Hauppauge Public Schools; FRANK PROCACCINI, in his Capacity as Member of the Board of Education, Hauppauge Public Schools; ANITA GAGLIARDI, in her Capacity as Member of the Board of Education, Hauppauge Public Schools; DONALD LESLIE, in his Capacity as Member of the Board of Education, Hauppauge Public Schools; JAMIE FAIRLEY, in his Capacity as Member of the Board of Education, Hauppauge Public Schools; JOYCE O'LEARY, in her Capacity as Member of the Board of Education, Hauppauge Public Schools and PAUL A. LOCHNER, in his Capacity as Superintendent, Hauppauge Public Schools,**

***Defendants-Appellees.***

* * *

Appeal from the United States District Court for the Eastern District of New York (Mishler, *J.*).

**UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED** that the judgment be **AFFIRMED**.

Leonard S. Levine appeals a judgment of the United States District Court for the Eastern District of New York granting summary judgment in favor of the defendants in Levine's action pursuant to 42 U.S.C. § 1983. Levine alleges that the defendants, various officials of the Hauppauge Public

Schools, subjected him to "unequal and differential" treatment in retaliation for the exercise of his First Amendment rights. We affirm.

"[A] plaintiff making a First Amendment retaliation claim under § 1983 must initially demonstrate by a preponderance of the evidence that: (1) his speech was constitutionally protected, (2) he suffered an adverse employment decision, and (3) a causal connection exists between his speech and the adverse employment determination against him, so that it can be said that his speech was a motivating factor in the determination." *Morris v. Lindau*, 196 F.3d 102, 110 (2d Cir. 1999). "If a plaintiff establishes these three factors, the defendant has the opportunity to show by a preponderance of the evidence that it would have taken the same adverse employment action 'even in the absence of the protected conduct.' " *Id.* (quoting *Mount Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977)).

Levine claims that because of his criticism of certain school district officials and policies, he was singled out for prosecution and punishment. He cites three episodes: (i) Levine's violation of the school district's corporal punishment policy ("the corporal punishment incident"); (ii) his fraudulent alteration of residency documents in order to avoid paying tuition for his non-resident daughter, in violation of the school district's policy ("the non-residency incident"); and (iii) his temporary assignment to the Whiporwil School ("the Whiporwil incident").

(i) Levine brought an Article 78 proceeding seeking to annul the three-year suspension imposed by the school

district for, *inter alia*, violating the corporal punishment policy. Levine did not deny striking the student, and the court found that the suspension was proportionate to Levine's misconduct. Levine is collaterally estopped from relitigating the imposition or the severity of this penalty.

A federal court gives a state court judgment the same preclusive effect that such a judgment would be given in the courts of the state from which the judgment emerged. *See Burka v. New York City Transit Auth.*, 32 F.3d 654, 657 (2d Cir. 1994). Accordingly, we look to New York state law to determine what preclusive effect to give the state court judgments in this case. Under New York law, a party is collaterally estopped from relitigating an issue in a second proceeding if "the identical issue was necessarily decided in the prior action and is decisive in the present action," and the party to be precluded had "a full and fair opportunity to contest the prior determination." *See D'Arata v. New York Cent. Mut. Fire Ins. Co.*, 563 N.Y.S.2d 24, 26 (1990). For substantially the reasons stated by the district court, Levine is estopped from challenging the imposition and severity of his suspension.

However, Levine did not raise his constitutional claims of differential treatment during the Article 78 proceeding; he was therefore free to pursue his theory that the defendants' decision to investigate and bring the charges against him were themselves retaliatory acts. But Levine has failed to raise a genuine issue of material fact that such actions were causally connected to his exercise of his First Amendment rights. A plaintiff must produce "concrete evidence from which a reasonable juror could return a verdict in his favor."

*Dister v. Continental Group, Inc.*, 859 F.2d 1108, 1114 (2d Cir. 1988) (internal quotation marks omitted); *see also Meiri v. Dacon*, 759 F.2d 989, 998 (2d Cir. 1985) ("The summary judgment rule would be rendered sterile . . . if the mere incantation of intent or state of mind would operate as a talisman to defeat an otherwise valid motion."). Conclusory allegations of retaliation cannot defeat a summary judgment motion. *See Flaherty v. Coughlin*, 713 F.2d 10, 13 (2d Cir. 1983). Here, Levine's allegations of retaliation are wholly conclusory. He offered no concrete evidence to support his allegation that the charges against him were substantially motivated by the defendants' retaliatory animus.

(ii) Levine's claims related to the non-residency incident are barred by the statute of limitations. In § 1983 actions, we look to the statute of limitations for personal injury actions in the state in which the alleged constitutional deprivation took place. *See Ormiston v. Nelson*, 117 F.3d 69, 71 (2d Cir. 1997). In New York, the applicable period is three years. *See* N.Y. C.P.L.R. 214(5) (McKinney 1998). This period began to run on May 28, 1993 at the latest, when Levine signed a stipulation settling the charges against him and agreeing to certain disciplinary measures. Levine did not bring this action until June 12, 1997, over a year after the statute of limitations had run.

Levine cannot save his time-barred claims relating to the non-residency incident by merely asserting generally that there has been a continuing violation. *See Cornwell v. Robinson*, 23 F.3d 694, 704 (2d Cir. 1994) (discussing the doctrine of continuing violations). That line of attack is insufficiently preserved and presented. *See* Fed. R. App. P.

28(a)(9)(A) ("The appellant's brief must contain . . . appellant's contentions and the reasons for them, with citations to the authorities . . . on which the appellant relies . . . ."); *see also Frank v. United States*, 78 F.3d 815, 833 (2d Cir. 1996) ("[S]imply stating an issue does not constitute compliance with Rule 28(a): an appellant . . . must state the issue and advance an argument.").

(iii) Levine failed to meet his burden of proving that his speech was a substantial motivating factor in the decision to assign him to the Whiporwil School. *See Morris*, 196 F.3d at 110. Paul Lochner, the official responsible for Levine's assignment, did not even know Levine in 1991 or 1992, when Levine's critical comments were made. Further, Levine adduced no evidence that Lochner was aware of the comments at the time of the assignment to Whiporwil. Because Levine offers no more than "conclusory allegations and his own opinion," *Finnegan v. Board of Educ. of Sch. Dist. of Troy*, 30 F.3d 273, 274 (2d Cir. 1994), the district court properly concluded that there was no genuine issue of material fact as to Levine's claims based on the Whiporwil incident.

For the reasons set forth above, the judgment is hereby **AFFIRMED**.

FOR THE COURT:
ROSEANN B. MACKECHNIE,
CLERK
By:

s/ Lucille Carr
Lucille Carr, Deputy Clerk

## *APPENDIX B — MEMORANDUM DECISION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK DATED AUGUST 10, 1999*

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

97 CV 3008

LEONARD LEVINE,

PLAINTIFF,

– AGAINST –

HAUPPAUGE PUBLIC SCHOOLS, ROBERT C. DALLOW, IN HIS CAPACITY AS ACTING SUPERINTENDENT, HAUPPAUGE PUBLIC SCHOOLS AND AS PRINCIPAL, HAUPPAUGE PUBLIC SCHOOLS, ROBERT C. PARRY, IN HIS CAPACITY AS SUPERINTENDENT, HAUPPAUGE PUBLIC SCHOOLS, BOARD OF EDUCATION, HAUPPAUGE PUBLIC SCHOOLS, AND ROBERT BIELLO, FRANK PROCACCINNI, ANITA GAGLIARDI, DONALD LESLIE, JAMIE FAIRLEY AND JOYCE O'LEARY, IN THEIR CAPACITIES AS MEMBERS OF THE BOARD OF EDUCATION, HAUPPAUGE PUBLIC SCHOOLS,

DEFENDANTS.

MEMORANDUM OF DECISION AND ORDER

AUGUST 10, 1999

* * *

*Appendix B*

MISHLER, DISTRICT JUDGE:

This action is brought pursuant to 42 U.S.C. § 1983 and the First and the Fourteenth Amendments to the U.S. Constitution, for compensatory and punitive damages as well as equitable relief. Leonard Levine ("Plaintiff" or "Levine") alleges "unequal and differential application of policies of the Hauppauge Public Schools, ("The District") . . ." (Complt. ¶ 1) in retaliation for the exercise of his First Amendment rights, resulting in his unpaid suspension from employment as a high school assistant principal.

Defendants move for summary judgment under Fed. R. Civ. Pro. 56 on various grounds including collateral estoppel, qualified immunity, the statute of limitations, and municipal liability.

**BACKGROUND**

Levine points to three incidents in particular in support of his differential treatment claims. First, in April 1993, defendants (through defendant Dallow) initiated an investigation into Levine's residency status and possible failure to pay tuition on his daughter's behalf. Prior to 1993, Levine's daughter had attended school in the District while living outside it. (Aff. L. Levine, ¶ 2.) Although the District's non-resident policy in force at the time provided that "a non-resident student maybe admitted to the district's schools *upon payment to the district of the appropriate tuition charge* . . . ," (emphasis added), Levine argues that the application of the policy unconstitutionally singled him out.

*Appendix B*

Defendants maintain that their investigation was based on probable cause that Levine's daughter had attended the District schools tuition-free and that the records showing her residence in Hauppauge were fraudulently altered. (McMorrow Aff., ¶ 46.) The investigation also targeted Michelle Levine, Mr. Levine's wife and a teacher in the District schools. After the investigation, the school attorney, Robert H. Cohen, drafted charges against Levine ("the residency charges") and forwarded them to the Hauppauge Board of Education ("The Board"). The Board then voted that probable cause existed and preferred charges against Levine (through defendant Parry) on April 15, 1993, pursuant to N.Y. State Education Law § 3020-a.

Plaintiff and his wife, represented by counsel, pleaded guilty to violation of § 3020-a (*i.e.*, conduct unbecoming a school administrator). In lieu of a hearing, Levine entered into a settlement with the District on May 28, 1993. Levine committed to the following:

- Payment to the district for half of the unpaid tuition applicable to his daughter during the period of her attendance at a Hauppauge public school (with the other half paid by his estranged wife).

- Payment to the district equal to three months of his salary.

- Written acknowledgment by Levine that he was primarily responsible for conduct unbecoming an administrator.

- A written statement by Levine that he would retire or resign in 1999.

*Appendix B*

The second incident giving rise to Levine's claims occurred on September 9, 1993. Plaintiff was accused of striking the back of a student's head in violation of the District's corporal punishment policy when the student refused to pick up paper that he had thrown on the floor of the school cafeteria. On September 10, 1993, the student's parents and plaintiff, among others, met and agreed that plaintiff would apologize to the student who was stricken and to the other students who witnessed the event. On September 13, 1993, the parents submitted a letter of complaint against plaintiff to Dr. Perpignano, the high school principal. On November 2, 1993, defendant Parry proposed ten disciplinary charges against plaintiff ("the striking charges") at a meeting of the Board, which included: violating the corporal punishment policy, conduct unbecoming an administrator, insubordination, and improper speech.[1]

A disciplinary hearing under § 3020-a was commenced on February 1, 1994 at which Levine was represented by counsel. The Hearing Panel ("Panel") reached a decision on June 14, 1994, and Levine was found guilty of two charges of misconduct and one charge of insubordination, as follows:

---

1. The last of these charges describes Levine's "use of obscenities and profanity with both staff and students, his hostile and abusive harangue of the High School Principal during a joint administrator-teacher committee meeting, and the flippant and sarcastic public remarks made at the High School's Academic Awards evening, all as more fully set forth in his 1991-1992 annual evaluation . . . ." (Charge 10.)

*Appendix B*

*Charge 1*: On September 9, 1993, in the cafeteria of the Hauppauge High School, Mr. Levine conducted himself in a manner unbecoming an administrator and violated the Rules of the Board of Regents, Section 19.5, when he used physical force on student Josh Gilbert by striking the back of his head for allegedly failing to pick up a piece of paper from the floor.

*Charge 2*: The use of physical force by Mr. Levine on September 9, 1993, as set forth in charge 1, constituted insubordination, in that Mr. Levine violated the district's policy on corporal punishment.

*Charge 6*: On September 13, 1993, in the cafeteria of the Hauppauge High School, Mr. Levine conducted himself in a manner unbecoming an administrator when, in the course of making his purported apology to the students who witnessed the incident described in Charge 1, he said, in sum and substance, "if you keep the paper on the table, I'll keep my hands in my pocket."

The remaining charges were dismissed. The Panel recommended a three-year suspension of Levine, without pay. On June 21, 1994, the Board (consisting of defendants Biello, Procaccini, Gagliardi, Leslie, Fairley and O'Leary) voted to accept the Panel's decision and suspended Levine for three years, commencing on September 1, 1994. In late 1994, Levine brought an Article 78 proceeding in the Supreme Court of New York, Suffolk County, to annul the decision of the Board.

Levine was suspended until September 1997, at which time he returned first as an administrator assigned to the

Whipoorwil School by defendant Lochner and then as an assistant principal. He filed a grievance with his teacher's union concerning his assignment to the Whipoorwil School, and he wrote a letter to defendant Lochner dated June 10, 1997 complaining of the proposed assignment. He now claims that the reassignment constituted "a continuation of the differential and discriminatory treatment [he] has received . . . from the defendants, based upon his exercising his First Amendment right to speak out on District practices and policies which are of a public nature and concern . . . ." (Complt. ¶ 55.)

On June 12, 1997, Levine filed the instant action. With regard to the striking charges, he claims that, in contrast to the many District employees who have been accused of corporal punishment violations but never been charged, charges were preferred against him in retaliation for his First Amendment activities.

## DISCUSSION

### THE SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate when there is no genuine issue of material fact as to the evidence, read in a light most favorable to the non-moving party. *Brown v. City of Oneonta*, 106 F.3d 1125, 1130 (2d Cir. 1997). The court applies this standard to all the facts in evidence, regardless of whether they are presented directly or inferentially. *Garza v. Marine Trans. Lines, Inc.*, 861 F.2d 23, 26 (2d Cir. 1988). To survive a motion for summary judgment, the non-moving party must "do more than simply show there is some

metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S.Ct. 1348 (1986). Rather, the non-moving party is obligated to point to evidence that is sufficient to demonstrate each element of each claim.

We apply the above standard to the issues discussed below.

## COLLATERAL ESTOPPEL

Defendants invoke the doctrine of collateral estoppel (or issue preclusion), based on the Article 78 proceeding, to prevent relitigation of Levine's case. To determine the preclusive effect of a prior decision, we look to the law of New York. *Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373, 380 105 S.Ct. 1327, 1331-32 (1985) (a federal court is to "refer to the preclusion law of the State in which judgment was rendered"); *American Tobacco Co. v. Mount Sinai School of Med.*, 880 F.2d 1520, 1526 (2d Cir. 1989). In this state, the doctrine of collateral estoppel is meant to "preclude[ ] a party from relitigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party . . . whether or not the tribunals or causes of action are the same." *Burgos v. Hopkins*, 14 F.3d 787, 792 (2d Cir. 1994); *Polur v. Raffe*, 912 F.2d 52, 55 (2d Cir. 1990); *Parker v. Blauvelt Volunteer Fire Co.*, 93 N.Y.2d 343, 349, 690 N.Y.S.2d 478, 482 (1999). The doctrine applies "if the issue in the second action is identical to an issue which was raised, necessarily decided and material in the first action, and the plaintiff had a full and fair opportunity to litigate the issue in the earlier action."

*Appendix B*

*Leather v. Eyck*, __ F.3d __, 1999 WL 378336, at *4 (2d Cir. June 11, 1999); *Parker*, 1999 WL at *3. *See also Ryan v. New York Telephone Co.*, 62 N.Y.2d 494, 501, 478 N.Y.S.2d 823, 827 (1984).

**A. *The Three Year Suspension***

Defendants argue that Levine is bound by the determination reached in the Article 78 proceeding in which his petition to annul his suspension was denied. According to defendants,

> Plaintiff accepted the guilt and cannot now challenge that finding. As such, plaintiff has been found to be guilty and the penalty imposed reasonable and is bound by those findings in this action. Therefore, plaintiff is unable, as a matter of law to allege that the finding of guilt or the punishment imposed was unreasonably severe or based on an improper motive.

(Rule 56.1 Reply Stmt. ¶ 61.) We agree.

In the Article 78 proceeding, Levine sought to annul his three-year suspension, but he accepted his guilt as to the underlying charges. In an opinion dated February 24, 1995, the court upheld the Board's finding of guilt as to charges 1, 2 and 6, each of which were directed to Levine's violation of the corporal punishment policy. In reaching its conclusion, the court explicitly noted: "[p]etitioner does *not* contest the findings of guilt, only the punishment." (Art. 78 Op. at 1.) It stated in this regard: "[i]n considering the appropriate

sanction to impose for a proven act of misconduct, clearly, an employee's entire past history is relevant and can be taken into account." (*Id.* at 2) (citations omitted). In particular, the evidence before the court included

> a letter dated May 21, 1993, from the Superintendent of Schools, in which petitioner was formally reprimanded for misrepresenting the true residence of his daughter in order to avoid paying non-resident tuition over a period of years. The letter of reprimand characterized petitioner's conduct as 'unprofessional and unbecoming an administrator of this District,' and put petitioner on notice that such conduct and poor professional judgment would not be tolerated. The May 21 letter of reprimand was part of a stipulation of settlement between petitioner and the Board of Education in which petitioner and his wife, a teacher, *inter alia*, pled guilty to a charge of conduct unbecoming an administrator/teacher and agreed to make full restitution of non-resident tuition to the District in the amount of $ 22,120, plus 6% interest.

(*Id.*) The court concluded that "[b]ased upon petitioner's record, clearly, his suspension for three years does *not* shock this Court's sense of fairness . . . ." (*Id.* at 3.)

The determination of the propriety of Levine's punishment, which took into consideration the totality of the circumstances, was therefore necessary and material to the court's decision, on the merits, not to annul it.

Additionally, Levine's opportunity to litigate the prior decision was full and fair. It is well-established that a determination of whether the first action genuinely afforded a full and fair opportunity to litigate requires consideration of

> the realities of the [prior] litigation, including the context and other circumstances which . . . may have had the practical effect of discouraging or deterring a party from fully litigating the determination which is now asserted against him.

*Ryan*, 62 N.Y.2d at 501, 478 N.Y.S.2d at 827 (citing *People v. Plevy*, 52 N.Y.2d 58, 65, 436 N.Y.S.2d 224 (1980)).

Although Levine has the duty to demonstrate that the Article 78 proceeding did not afford him a full and fair opportunity to litigate propriety of his punishment, *see Kirkland v. City of Peekskill*, 828 F.2d 104, 108 (2d Cir. 1987) (burden of establishing the absence of a full and fair opportunity to litigate issue in the prior action rests with opponent of collateral estoppel), *Parker*, 93 N.Y.2d at 349, 690 N.Y.S.2d at 482-83, he is silent on this point. Nonetheless, we note that it has been held that New York's Article 78 proceeding comports with due process inasmuch as it "provides a mechanism for challenging a specific decision of a state administrative agency." *See Campo v. New York City Employees' Retirement Sys.*, 843 F.2d 96, 101 (2d Cir. 1988). In *Giglio v. Dunn*, 732 F.2d 1133 (2d Cir. 1984), for instance, the court, concluded that a high school principal, who claimed that his resignation was coerced, could challenge the voluntariness of his resignation in an Article 78

proceeding and that the opportunity provided all the process constitutionally due.

In the instant case, Levine was represented by counsel at a lengthy hearing, and numerous letters from plaintiff's work file were admitted into evidence. There is no indication — from the record or from Levine himself — that Levine was not afforded his day in court fully and fairly.

In addition, there is no real dispute that the issues raised in the Article 78 proceeding are identical to those in the present action. Yet, even if there were any doubt on this issue, it is well settled that issues are deemed identical if "a different decision in the second suit would necessarily 'destroy or impair rights or interests established by the first.' " *American Tobacco*, 880 F.2d at 1527 (citing *Ryan*, 62 N.Y.2d at 500, 478 N.Y.S.2d at 826). The issues in the instant case involve the severity of Levine's three-year punishment in connection with both the striking and residency charges, as did the issues in the Article 78 proceeding. Certainly, a decision adverse to defendants in this case would undermine the interest they had in penalizing Levine for his misconduct, as established by the earlier Article 78 proceeding. *See, e.g.*, *Parker*, 93 N.Y.S.2d at 350, 690 N.Y.S.2d at 483 ("The dispositive factual and legal issues in plaintiff's claims of deprivation of his constitutional rights in this 42 U.S.C. § 1983 civil rights action are identical to the allegations of constitutional violations asserted as a basis for annulment of defendant's disciplinary determinations, decided against plaintiff in the prior CPLR article 78 proceeding").

Finally, we note that a court's decision to apply collateral estoppel is not affected by the exclusion, under New York

law, of recovery for monetary damages in Article 78 proceedings. Citing *Davidson v. Capuano*, 792 F.2d 275 (2d Cir. 1986), plaintiff argues that since compensatory damages could not have been awarded in the Article 78 proceeding, he is not precluded from pursuing them now. However, as the court in *Burgos* stated, "[t]hat he was unable to receive damages in his state . . . petition may relieve him of res judicata application, but it does not necessarily change the fact that a court has already decided the issues he now raises." 14 F.3d at 792 (citing *Cepeda v. Coughlin*, 785 F. Supp. 385, 388 (S.D.N.Y. 1992) (noting that parties agree that res judicata does not apply to § 1983 action having identical claims to prior Article 78 proceeding, but that defendants assert that collateral estoppel still applies)).[2]

In light of the above, Levine cannot now revisit the very same issues he had an opportunity to litigate — and did litigate, albeit unsuccessfully — in the earlier proceeding. Since the doctrine of collateral estoppel is squarely applicable to Levine's claims dealing with his three-year suspension, as based on both the striking and residency charges, his causes of action on these grounds must be dismissed.

---

2. Under the transactional approach to res judicata adopted by New York, "once a claim is brought to a final conclusion, all other claims arising out of the same transaction . . . are barred, even if based upon different theories or if seeking a different remedy . . . ." *American Tobacco*, 880 F.2d at 1527 (citing *O'Brien v. City of Syracuse*, 54 N.Y.2d 353, 357, 445 N.Y.S.2d 823, 826 (1994)). However, "a prior adjudication will not bar later claims if the initial forum did not have power to award the full relief sought in the later litigation. *Cepeda*, 785 F. Supp. at 388 n.1 (discussing preclusive effect of Article 78 proceeding on subsequent § 1983 action).

*See, e.g., Ryan*, 62 N.Y.2d 494, 478 N.Y.S.2d 823. These issues were necessarily addressed by the court in the Article 78 proceeding in arriving at its decision to uphold Levine's 3-year suspension.

**B. *The Reassignment to The Whipoorwil School***

The other act Levine complains of — his two-week reassignment to the Whipoorwil School after his suspension period — was not a subject of the Article 78 proceeding. However, it was the subject of a grievance filed by Levine on September 2, 1997 to the Hauppauge Association of Administrative Personnel ("HAAP"), pursuant to his collective bargaining agreement ("CBA"). With regard to the outcome of the filing, Levine testified as follows:

> Basically I got my time back. The district agreed to the time sequence that they had assigned me was illegal, against the contract, and that is all I got basically out of the grievance, because the other issues were not grievable according to the union. The only thing that was grievable was the time.

(Tr. at 17.) He contends, however, that the decision by the District and defendant Lochner to locate him in the Whipoorwil School was nonetheless a "banishment" (in retaliation for his exercise of his First Amendment rights) that denied him "the opportunity to perform his duties as High School Assistant Principal, his designated title in the duly executed June 2, 1997 salary agreement letter." (Complt. ¶ 54.)

*Appendix B*

The relevant circumstances, according to plaintiff's evidence, were as follows: in a June 2, 1997 salary agreement letter that Levine submits, he and the District agreed to an annual salary of $ 96,422 and to the title of High School Assistant Principal. In a June 9, 1997 letter, defendant Lochner explained that Levine's duties would include acting as "Administrator in Charge of Whiporwil." Levine objected to his title, placement, and job duties in a letter dated June 10, 1997. Then, by letter dated September 17, 1997 to Levine's attorney, Robert Cohen agreed to resolve the HAAP grievance under the CBA: he agreed to name Levine High School Assistant Principal and assign him the hours he requested in his grievance. Levine thereafter returned to the Hauppauge High School, as an Assistant Principal.

In response to Levine's claims, defendants contend that Levine has not demonstrated a material issue of fact as to defendants' motivation for the reassignment. To sustain an action under § 1983 for retaliation against an individual who exercises his constitutional right to free speech, a plaintiff must show (1) that the speech at issue is constitutionally protected and (2) that the protected speech was a substantial factor in the decision to discipline the plaintiff. *Mount Healy City School Dist. v. Doyle*, 429 U.S. 274, 287, 97 S.Ct. 568 (1977). The second of these elements can be proven by (1) evidence of retaliatory action occurring close in time to the protected activities; (2) disparate treatment of those similarly situated; or (3) direct proof of retaliatory animus. *Philippeaux v. Fashion Instit. Of Tech.*, 1996 WL 734038, at *1 (2d Cir. Dec. 23, 1996) (citing *DeCinto v. Westchester Co. Med. Ctr.*, 821 F.2d 11, 115 (2d Cir. 1987)). If the plaintiff carries this burden, a defendant must "prove by a preponderance of the

evidence that [it] would have taken the same action even if the improper motive had not existed." *Nicholas v. Mantello*, __ F.3d __, 1999 WL 357857, at *2 (2d Cir. May 28, 1999).

Assuming *arguendo* that Levine's speech was protected, we nonetheless find that plaintiff has failed to adduce any evidence that defendants assigned Levine to the Whipoorwil School *substantially* on the basis of his speech. Indeed, defendant Lochner did not even know Levine until 1997, and no evidence is introduced that Lochner was aware of Levine's outspokenness prior to or at the time of assignment. The other defendants who may have had some role in the decision, namely, Bilyk, Curra, and Cohen, have also not been shown to have acted substantially from improper motive: there is not even a close proximity in time between the alleged exercise of Levine's First Amendment rights in 1991 and 1992 and the alleged retaliatory reassignment in 1997. *See, e.g.*, *Hollander v. American Cyanamid Co.*, 895 F.2d 80, 85-86 (2d Cir. 1990) (granting summary judgment because 10-month period between protected activity and alleged retaliatory action was insufficient to create inference of retaliation). Nor has Levine presented evidence that his reassignment by defendants constituted treatment different from others similarly situated. *Philippeaux*, 1996 WL 734038, at *1 (upholding summary judgment in favor in favor of employer for failure to show evidence of disparate treatment); *San Filippo v. Bongiavanni*, 30 F.3d 424 (3d Cir. 1994). There is also no direct evidence of retaliatory animus. Defendants provide a legitimate reason for the reassignment: to gradually integrate Levine back into the school system. Moreover, the uncontroverted evidence indicates that it was Lochner's ultimate decision alone to reassign Levine.

At most, Levine presents "conclusory allegations and his own opinion" that the real reason he was assigned to the Whipoorwil School was based on his First Amendment activities. *Finnegan v. Board of Educ. Of School Dist. of Troy*, 30 F.3d 273, 274 (2d Cir. 1994). His failure to submit evidence that would establish a genuine issue of material fact as to defendants' intent to discriminate against him, however, allows us to grant summary judgment in favor of defendants. *See, e.g., Dean v. Sausalito-Martin City Sanitary Dist.*, 1996 WL 490786 (9th Cir. Aug. 28, 1996) (upholding summary judgment on § 1983 /First Amendment violation claim where employee was reassigned, and where evidence of retaliatory intent was too weak to make an inference).

Accordingly, Levine's First Amendment and § 1983 claims relying on defendants' conduct in assigning him to the Whipoorwil School fail.

**THE STATUTE OF LIMITATIONS GOVERNING THE CLAIMS BASED ON LEVINE'S RESIDENCY STATUS AND THE PREFERRING OF CHARGES**

The statute of limitations for a § 1983 action is governed by the limitations period for personal injury actions in the state in which the claim accrued. *Ormiston v. Nelson*, 117 F.3d 69, 71 (2d Cir. 1997); *McCarthy v. National Broadcasting Co., Inc.*, 1998 WL 634555, at *2 (2d Cir. Feb. 24, 1998). In New York, this period is three years. *See* C.P.L.R. § 214(5). Indeed, the parties agree that the applicable statute of limitations period for Levine's causes of action is three years.

Even if Levine were not collaterally estopped from bringing claims directed to the residency charges, these claims are barred by the statute of limitations. Federal law " 'governs the determination of the accrual date (that is, the date the statute begins to run) for purposes of the statute of limitations' in a civil rights action." *McCarthy*, 1998 WL 634555 at *2 (citing *Ormiston*, 117 F.3d at 71). It is well-settled in this circuit that the limitations period accrues "when the plaintiff knows or has reason to know of the injury which is the basis of his action," *Singleton v. City of New York*, 632 F.2d 185, 191 (2d Cir. 1980).[3]

Plaintiff argues that June 21, 1994 is controlling for limitations purposes with respect to the residency charges as well. We disagree. If he was not aware of the injury befallen him when an investigation into his residency status was commenced, Levine was certainly aware that he had incurred injury when the residency charges were preferred against him on April 15, 1993, when his first § 3020-a proceeding began, and when he signed the May 28, 1993 stipulation agreeing to pay three months' salary, half the

3. The statute of limitations begins to run when the determination to be reviewed becomes final and binding. C.P.L.R. 217. "A challenged determination is final and binding when it 'has its impact' upon the petitioner who is thereby aggrieved." *Healy v. Sheldon*, 652 N.Y.S.2d 886, 887, 235 A.D.2d 992 (3d Dep't 1997) (citing *Matter of Edmead v. McGuire*, 67 N.Y.2d 714, 716, 499 N.Y.S.2d 934 (1986)). In *Healy*, the statute of limitations began to run when the teacher was notified of the Board's vote to terminate him, not the date upon which it rendered its decision. Similarly, the triggering date for the claims based on the striking charges is shortly after June 21, 1994, *i.e.*, the day Levine received the Board's decision. The claims based on these charges therefore appear to be timely.

tuition his daughter had incurred, and to resign. "Each of these acts individually — and certainly all of them together — placed Plaintiff on notice of Defendants' alleged retaliatory intentions." *Falinski v. Kuntz*, 38 F. Supp.2d 250, 255 (S.D.N.Y. 1999) (referring to when defendants "began the Disciplinary Proceedings pursuant to § 3020-a" as triggering statute of limitations and barring § 1983 claim on this basis).

To the extent he states that he "realized for the first time that he was suffering from a perpetuated wrong when the Board of Education voted on June 21, 1994 to impose a three year suspension without pay" (Br. at 12), in essence, Levine argues that his claims based on the residency charges are timely under a "continuing violation" theory. *See Brennan v. City of White Plains*, 1998 WL 75692, at *5 (S.D.N.Y. Feb. 20, 1998) (inferring "that a continuing violation had been pled" even though plaintiff "did not explicitly assert that a continuing violation had occurred"). According to this doctrine, "[w]here a continuing violation can be shown, the plaintiff is entitled to bring suit challenging all conduct that was a part of that violation, even conduct that occurred outside the limitations period." *Cornwell v. Robinson*, 23 F.3d 694, 704 (2d Cir. 1994) (citing *Association Against Discrim. in Employment v. City of Bridgeport*, 647 F.2d 256, 274 (2d Cir. 1981)). The continuing violation exception "extends the limitations period for all claims of discriminatory acts committed under [an ongoing policy of discrimination], even if those acts, standing alone, would have been barred by the statute of limitations." *Annis v. County of Westchester*, 136 F.3d 239, 246 (2d Cir. 1998); *Lightfoot v. Union Carbide Corp.*, 110 F.3d 898, 907 (2d Cir. 1997).

Although this doctrine may be disfavored in the Second Circuit, *see, e.g., Sharkey v. Lasmo*, 992 F. Supp. 321, 324 (S.D.N.Y. 1998) (citing cases), and its application to § 1983 cases questionable, *see, e.g., Hayes v. New York State D.O.C. Officers*, 1998 WL 901730 (S.D.N.Y. Dec. 28, 1998), we note that to the extent Levine can show a continuing violation, his claims may not be barred. However, Levine cannot demonstrate a continuing violation without invoking the striking charges. *See Muniz Cabrero v. Ruiz*, 23 F.3d 607, 610 (1st Cir. 1994) ("To establish a continuing violation plaintiff 'must allege that a discriminatory act occurred . . .' within the period prescribed by the statute") (citing *Johnson v. General Elec.*, 840 F.2d 132, 137 (1st Cir. 1988)). Since relitigation of the striking charges, as they relate to his three year suspension, is precluded on collateral estoppel grounds, they cannot provide a basis for a continuing violation. Absent the striking charges, the claims based on the residency charges — standing alone — are time-barred.

**ORDER**

Defendants' motion for summary judgment is granted, and it is

SO ORDERED.

The Clerk is directed to enter judgment in favor of the defendants and against the plaintiff, dismissing the complaint.

s/ Jacob Mishler
JACOB MISHLER, U.S.D.J.

**APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED MAY 17, 2000**

**UNITED STATES COURT OF APPEALS**
**FOR THE SECOND CIRCUIT**
**UNITED STATES COURT HOUSE**
**40 FOLEY SQUARE**
**NEW YORK 10007**

**ROSEANN B. MACKECHNIE**
**CLERK**

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 17th day of May two thousand.

Dkt No: 99-7981

Levine

P!aintiff-Appellant,

v

Hauppauge Public

Defendant-Appellee

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellant Levine.

*Appendix C*

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED.**

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

**FOR THE COURT**

ROSEANN B. MACKECHNIE,
Clerk

By: s/ Beth J. Meador
Beth J. Meador,
Administrative Attorney

No. 00-264

Supreme Court, U.S.
FILED
SEP
CLERK

IN THE

# Supreme Court of the United States

LEONARD S. LEVINE,

*Petitioner,*

—v.—

HAUPPAUGE PUBLIC SCHOOLS; ROBERT C. DALLOW, in his Capacity as Acting Superintendent, Hauppauge Public Schools and as Principal of Hauppauge High School; ROBERT C. PARRY, in his Capacity as Superintendent of Hauppauge Public Schools; BOARD OF EDUCATION, Hauppauge Public Schools; ROBERT BIELLO, in his Capacity as Member of the Board of Education, Hauppauge Public Schools; FRANK PROCACCINI, in his Capacity as Member of the Board of Education, Hauppauge Public Schools; ANITA GAGLIARDI, in her Capacity as Member of the Board of Education, Hauppauge Public Schools; DONALD LESLIE, in his Capacity as Member of the Board of Education, Hauppauge Public Schools; JAMIE FAIRLEY, in his Capacity as Member of the Board of Education, Hauppauge Public Schools; JOYCE O'LEARY, in her Capacity as Member of the Board of Education, Hauppauge Public Schools and PAUL A. LOCHNER, in his Capacity as Superintendent, Hauppauge Public Schools,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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18PA

## QUESTION PRESENTED

Whether certiorari should be granted where the district court properly granted summary judgment, pursuant to Fed. R. Civ. P. 56(c), finding no genuine issue of material fact, thereby, entitling Respondents to judgment as a matter of law.

## TABLE OF CONTENTS

Question Presented ..... i

Table of Contents ..... ii

Table of Citations ..... ii, iii, iv

Opinions Below ..... 1

Provisions and Rules Involved ..... 1,2

Statement of the Case ..... 3

Reasons for Denying the Writ ..... 8

Argument ..... 9

Conclusion ..... 13

## TABLE OF CITATIONS

**Cases Cited:**

*Bernheim v. Leit*,
79 F.3d 318, 324 (2nd Cir. 1996) ..... 10

*Binder v. Long Island Lighting Co.*,
933 F.2d 187, 191 (2nd Cir. 1991) ..... 9

*Celotex Corp. v. Catrett*,
477 U.S. 317, 322, 106 S.Ct. 2548, 2552,
91 L.Ed.2d 265 (1986) ..... 9,10

*Dister v. Continental Group, Inc.*,
859 F.2d 1108, 1114 (2nd Cir. 1988) ..... 9

*Easton v. Sundram*,
947 F.2d 1011,1015 (2nd Cir. 1991),
cert denied 504 US 911, 112 S. Ct. 1943,
118 LE2d 548 (1992) ..... 10

*Ezekwo v. NYC Health & Hospitals Corp.*,
940 F.2d 775 (2nd Cir. 1991) ..... 10

*Finnegan v. Board of Education of School District of Troy*, 30 f.3d 273, 274
(2nd Cir. 1994) ..... 9

*Flaherty v. Coughlin*,
713 F.2d 10, 13 (2nd Cir. 1983) ..... 9

*Goenaga v. March of Dimes Birth Defects Found.*,
51 F.3d 14, 18 (2nd Cir. 1995) ..... 9,10

*Hollander v. American Cyanamid Co.*,
895 F.2d 80, 85-86 (2nd Cir. 1990) ..... 11

*Matsuchita Elect. Indust. Co. v. Zeniti Radis Corp.*,
475 U.S. 574, 586, 106 S.Ct. 1348 (1986) ..... 10

*Meiri v. Dacon*,
759 F.2d 989, 998 (2nd Cir. 1985) ..... 12

*Mount Healy City School District v. Doyle*,
429 U.S. 274, 287, 97 S.Ct. 568 (1977) ..... 10

**Statutes Cited:**

42 U.S.C. §1983 ..... 1,2

**Rule Cited:**

Federal Rule of Civil Procedure 56(c) ..... 2

## OPINIONS BELOW

On August 10, 1999, the Honorable Jacob Mishler, United States District Court for the Eastern District of New York, issued an order granting the motion of the Respondents for summary judgment, pursuant to Federal Rule of Civil Procedure 56(c), finding no genuine issue of material fact, thereby dismissing all federal claims against the Respondents.

Petitioner appealed from said order and on March 28, 2000, the United States Court of Appeals for the Second Circuit denied Petitioner's appeal finding that Petitioner had failed to raise a genuine issue of material fact or causally connect the actions of the Respondents to his alleged exercise of his First Amendment rights.

A copy of the original judgment of the District Court as well as the order of the United States Court of Appeals for the Second Circuit are already set forth in Petitioners' appendix.

## PROVISIONS AND RULES INVOLVED

**Civil Rights Act—42 U.S.C. § 1983:**

> Every person who under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the

> Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress...

**Rule 56(c) of the Federal Rules of Civil Procedure, F. R. Civ. P. 56(c), provides in pertinent part:**

> (c) Motion and Proceedings Thereon.
>
> The motion [for summary judgment] shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions of file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law...

## STATEMENT OF THE CASE

The Petitioner, Leonard Levine, (hereinafter referred to as "Mr. Levine") was a high school assistant principal and a tenured administrator within the school district at all relevant times. Mr. Levine was the subject of two disciplinary actions as a result of violating the established district policy of the Hauppauge Public Schools. The first disciplinary proceeding was resolved at the close of the 1992/1993 school year with an admission of guilt by Mr. Levine. The proceedings were commenced because Mr. Levine knowingly permitted his daughter to attend school within the district, while she resided outside the school district, without paying tuition as was required for a non-resident student.

It is undisputed, that as a high school assistant principal and tenured administrator, the Petitioner was aware of the residency requirements and tuition assessed to non-resident children attending the school. The investigation was commenced by the school district due to the involvement of an assistant principal and a teacher in the violation of district policy and because the deception involved fraudulent modifications made within the school district records to conceal the actual residence of Mr. Levine's daughter.

As a high school assistant principal and tenured administrator, Mr. Levine had an obligation to the School District to follow District policy and not to place himself or his family above the law. Mr. Levine does not dispute the fact that he concealed the residency of his daughter from the School District despite being aware of her attendance in the School District.

An investigation was conducted concerning the failure to pay tuition by Mr. Levine and his wife, also an employee and teacher in the district, resulting in disciplinary charges being preferred against both of them on or about April 15, 1993, pursuant to provisions of Section 3020-a of the New York State Education Law. It is also undisputed that the child's records were improperly changed to give the appearance of a Hauppauge residence when such was not the case.

The Petitioner, Leonard Levine, admitted guilt to the charges and specifically asked to bear a greater portion of the responsibility than his wife, who also admitted guilt. The terms of the stipulation of settlement were negotiated between Mr. Cohen, the attorney for the School District, and Mr. Levine's counsel, John Ray, Esq. The Petitioner elected to enter into a stipulation of settlement along with his wife requiring Mr. and Mrs. Levine to each repay the district one-half of $22,130.00 as tuition for their daughter's attendance in the school district. Pursuant to the agreement, Mr. Levine also agreed to pay a fine equivalent to three months salary.

The second disciplinary proceeding concerned an incident, which occurred two days into the next school year. Mr. Levine struck a student in the back of the head for refusing to adhere to his directive to pick up a piece of paper that had been thrown on the floor of the school cafeteria. Numerous witnesses appeared on behalf of the student and testified that Mr. Levine struck the back of the student's head with significant force. After the slapping incident, Mr. Levine met with the child's parents and a guidance counselor to discuss the incident. Mr. Levine promised to make a public apology to the student. Due to a belief that Mr. Levine's apology was without sincerity and demonstrated no remorse, the child's parents elected to pursue a complaint

against Mr. Levine. Mr. Levine was afforded a full hearing on the issue of this violation of the school district's corporal punishment policy which forbids the striking of a student by a staff member. After the hearing, a decision was rendered by a panel of three impartial individuals, wholly unrelated to the school district, finding that the plaintiff had violated the District's corporal punishment policy.

Mr. Levine never sought judicial review of the voluntary settlement he entered into with the assistance of counsel for his violation of the school district's non-resident student policy. The disciplinary proceeding for this violation and the resulting settlement were resolved by May 28, 1993, more than three years prior to the initiation of the current law suit on June 12, 1997. The Second Circuit properly applied a three-year statute of limitations to the Petitioner's claims of a constitutional violation under 42 USC Section 1983. The Petitioner has not challenged the portion of the Second Circuit's decision which held that all claims concerning the Petitioner's punishment for violating the District's non-resident student policy were time barred by the applicable statute of limitations.

Mr. Levine sought review of the conviction related to the slapping of the student. Justice Michael Mullen of the Supreme Court of Nassau County dismissed Mr. Levine's Article 78 proceeding which challenged the results of the hearing panel and the three-year suspension. In the Article 78 proceedings, Justice Mullen concluded that the punishment of three years suspension was appropriate based on Mr. Levine's actions. Mr. Levine was represented in connection with the second 3020-a proceeding and the Article 78 proceeding by Paul Derkasch, Esq. The Second Circuit properly concluded that Mr. Levine was collaterally stopped from relitigiating the imposition of or the severity of the penalty since the identical

issue was necessarily decided in the Article 78 action, where the Petitioner had a full and fair opportunity to contest the prior determination. The Petitioner has elected not to challenge this portion of the Second Circuit's decision and therefore is bound by the determination that the imposition of a three-year suspension was an appropriate response to his striking of a student. The Second Circuit further held that Mr. Levine had offered no concrete evidence to support his allegation that the charges against him were substantially motivated by the Respondents' retaliatory animus.

In September of 1997, after the three year penalty was served, the Petitioner returned to work at the school district. He was initially assigned to a different position though at the same rate of pay and with the same title of High School Assistant Principal. During the temporary reassignment, he held the position of administrator in charge of the Whippoorwill School. This building was used by the District for its maintenance and grounds operations and operates as a nursery school, central storage, and as a meeting place for the boy scouts and other community activities. Mr. Levine held this position for approximately two weeks, at which time he returned to the high school and recommenced his role as a high school assistant principal.

The decision to assign him to that facility was based on his coming off a three-year suspension and a desire to gradually phase him back into the district. The decision to assign Mr. Levine to Whippoorwill was made by Dr. Paul Lochner, the new Superintendent of the Hauppauge Public Schools. The Board of Education was not involved in this decision. Dr. Lochner had never met the petitioner prior to his decision to temporarily assign Mr. Levine to the Whippoorwill school. Mr. Levine, in a letter dated August 1, 1997, complained to Dr. Lochner regarding this new

assignment. In response to this grievance, Dr. Lochner reassigned Mr. Levine back to the high school during the second week of the school year.

Mr. Levine also filed a grievance pursuant to the collective bargaining agreement with the teacher's union, HAAP, concerning his assignment to Whippoorwill School. The matter was rapidly resolved between Mr. Cohen, the school's attorney, and counsel for Mr. Levine. The only issue that the union found to be grievable was the earlier time at which Mr. Levine had to report to work resulting in a slight increase in the number of hours worked by Mr. Levine. The assignment to Whippoorwill and the duties that he was requested to perform at that location were found not to be grievable. Mr. Levine was represented by Robert Saperstein, Esq. in the grievance before the teacher's union. Mr. Levine was paid for the additional time owed him under the collective bargaining agreement at that time. The Second Circuit concluded that Mr. Levine had failed to meet his burden of proving that his speech was a substantial motivating factor in the decision to assign him to the Whippoorwill School because he had only offered conclusory allegations and his own opinions in support of his claims.

## REASONS FOR DENYING THE WRIT

Respondents submit that *no compelling* reasons exist in support of a grant of this petition.

The New York Court of Appeals has not decided any *important federal question* which conflicts with any other state court or a United States Court of Appeals.

The order of the Court of Appeals for the Second Circuit affirming the grant of summary judgment *does not conflict* with any decisions of other United States Courts of Appeals or with any decisions of New York's Court of Appeals.

Further, the original decision of the district court granting summary judgment as well as the order affirming that decision *does not raise any important questions* of federal law that need be resolved by this Honorable Court.

This case merely relates to the granting of summary judgment upon a finding of the lack of the existence of any *material issues of fact* and such a ruling should remain undisturbed.

Neither the Constitution of the United States of America nor the Constitution of New York State or any of its respected principles are implicated by the granting of summary judgment on behalf of the Respondents.

## ARGUMENT

### THE PETITIONER FAILED TO DEMONSTRATE ANY GENUINE ISSUES OF MATERIAL FACT SUFFICIENT TO DEFEAT THE GRANT OF SUMMARY JUDGMENT IN FAVOR OF THE RESPONDENT

The Second Circuit correctly applied the standard for granting summary judgment to this matter and concluded that the Petitioner failed to present any genuine issues of material fact sufficient to defeat a motion for summary judgment. It is well recognized that conclusionary allegations of retaliation cannot defeat a summary judgment motion. *Flaherty v. Coughlin*, 713 F.2d 10, 13 (2nd Cir. 1983); *Finnegan v. Board of Education of School District of Troy*, 30 F.3d 273, 274 (2nd Cir. 1994). The non-moving party must show that a disputed material facts exists in light of the substantive law by offering "concrete evidence from which a reasonable juror could return a verdict in [its] favor." *Dister v. Continental Group, Inc.*, 859 F.2d 1108, 1114 (2nd Cir. 1988). The petitioner failed to present any concrete evidence from which a reasonable juror could return a verdict in his favor and accordingly the grant of summary judgment by Judge Mishler and the subsequent affirmation by the Second Circuit should not be disturbed.

If after drawing all inferences and resolving all ambiguities in favor of the non-moving party, if it is evident that a "rational juror could not find for the non-movant, then there is no genuine issue of material fact and entry of summary judgment is appropriate." *Binder v. Long Island Lighting Co.*, 933 F.2d 187, 191 (2nd Cir. 1991). It is well established that when moving for summary judgment, "the movant's burden will be satisfied if he can point to an absence of evidence to support an essential element of the nonmoving party's claim." *Goenaga v. March of Dimes Birth Defects Found.*, 51 F.3d 14,

18 (2nd Cir. 1995), citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986).

To establish a retaliation claim under Section 1983, plaintiff must initially show that his or her conduct was protected by the First Amendment and that the defendants' conduct was motivated by or substantially caused by the plaintiff's exercise of free speech. *Bernheim v. Leit*, 79 F.3d 318, 324 (2nd Cir. 1996); *Easton v. Sundram*, 947 F.2d 1011,1015 (2nd Cir. 1991), cert denied 504 US 911, 112 S. Ct. 1943, 118 LE2d 548 (1992); *Mount Healy City School District v. Doyle*, 429 U.S. 274, 287, 97 S.Ct. 568 (1977). To set forth a First Amendment retaliation claim, the plaintiff must demonstrate that the alleged improper action would not have occurred but for the plaintiff's exercise of freedom of speech. *Ezekwo v. NYC Health & Hospitals Corp.*, 940 F.2d 775 (2nd Cir. 1991).

The lower courts reviewed the evidence presented by the parties including pleadings, exhibits and deposition testimony and concluded that the Petitioner failed to adduce any evidence that the Respondents assigned Mr. Levine to the Whippoorwill School substantially on the basis of his speech or that his punishment for striking a student in the back of the head was the product of his alleged exercise of his First Amendment Rights. To survive a motion for summary judgment, the non-moving party must "do more than show there is some metaphysical doubt as to the material facts." *Matsuchita Elect. Indust. Co. v. Zeniti Radis Corp.*, 475 U.S. 574, 586, 106 S.Ct. 1348 (1986). Rather, the non-moving party is obligated to point to evidence that is sufficient to demonstrate each element of each claim raised. The Petitioner failed to produce admissible evidence in support of his claim of a violation of the First Amendment of the Constitution and

therefore, the Respondents were properly awarded summary judgment.

The Second Circuit applied the appropriate standard articulated by this Court and concluded that the Petitioner had failed to offer any concrete evidence to support a claim that the punishment for violating the corporal punishment policy or the assignment to the Whippoorwill School were motivated by an unconstitutional retaliatory animus.

The District Court, relying upon *Hollander v. American Cyanamid Co.*, 895 F.2d 80, 85-86 (2nd Cir. 1990) (granting summary judgment became the 10-month period between the protected activity and alleged retaliatory action was insufficient to create an inference of retaliation), held that Mr. Levine failed to demonstrate an improper motive behind his assignment to Whippoorwill in 1997 for allegedly protected speech uttered in 1991 and 1992. Judge Mishler also held that the petitioner failed to demonstrate differential treatment from others similarly situated or any direct evidence of a retaliation animus. Mr. Levine also failed to demonstrate an improper motive in punishing him for striking a student in September of 1993 or any relationship to the allegedly protected speech in 1991 and 1992. The Petitioner has not challenged that portion of the Second Circuit's decision which held that he was barred from relitigating the imposition of and the severity of the punishment awarded for violating the School District's policy against corporal punishment. As a result, the Petitioner's inaccurate conclusions that the imposition of a three year suspension is evidence of differential treatment in retaliation for exercising his First Amendment Rights have been decided against the Petitioner and are not properly before this Honorable Court.

Merely concluding that the Respondents' motives were in retaliation for alleged protected speech which occurred years prior is insufficient to defeat a motion for summary judgment. "The summary judgment rule would be rendered sterile...if the mere incantation of intent or state of mind would operate as a talisman to defeat an otherwise valid motion." *Meiri v. Dacon*, 759 F.2d 989, 998 (2nd Cir. 1985).

Accordingly, the grant of summary judgment by the District Court and the affirmation of the decision by the Court of Appeals for the Second Circuit should not be disturbed and the current petition for a writ of certiorari be denied in its entirety.

## CONCLUSION

By virtue of the foregoing, the Respondents respectfully request that this Honorable Court deny the Petition for a Writ of Certiorari.

Dated: Albertson, New York
September 13, 2000

Respectfully submitted,

BY: Kevin G. McMorrow
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